

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Emigrant Storage LLC

)
)
)
)
)
)
)File No.: EB-SED-13-00008885¹

NAL/Acct. No.: 201232100034

FRN: 0021058938

FORFEITURE ORDER

Adopted: April 1, 2014**Released: April 1, 2014**

By the Acting Chief, Enforcement Bureau:

I. INTRODUCTION

1. We impose a penalty of \$20,000 against Emigrant Storage LLC (Emigrant), former licensee of Private Land Mobile Radio Service (PLMRS) station WPKM212, Reno, Nevada, for operating the station without authority for more than nine years and for failing to file a timely application to renew the station's license. We take this action as part of our duty to prevent unlicensed radio operations from dangerously interfering with authorized radio communications (potentially including emergency communications between first responders, such as public safety, law enforcement, emergency medical, and emergency response personnel) in the United States. In this case, by continuing to operate the station even after the station's license had expired, Emigrant actually caused interference to an authorized user of the spectrum. Emigrant does not deny the violations, but nonetheless urges that the proposed \$20,000 forfeiture should be cancelled or reduced. We decline to do so.

II. BACKGROUND

2. On July 31, 2012, the Enforcement Bureau (Bureau) released a *Notice of Apparent Liability for Forfeiture*² proposing a \$20,000 forfeiture against Emigrant for its apparent willful and repeated violations of Section 301 of the Act and of Sections 1.903(a) and 1.949(a) of the Rules³ by

¹ The investigation was initiated under File No. EB-11-SE-102 and subsequently assigned File No. EB-SED-13-00008885. Any future correspondence with the FCC concerning this matter should reflect the new case number.

² *Emigrant Storage LLC*, Notice of Apparent Liability for Forfeiture, 27 FCC Rcd 8917 (Enf. Bur. 2012) (NAL). The NAL includes a more complete recitation of the facts and history of this case and is incorporated herein by reference.

³ 47 U.S.C. § 301; 47 C.F.R. §§ 1.903(a), 1.949(a). See also *Biennial Regulatory Review – Amendment of Parts 0, 1, 13, 22, 24, 26, 27, 80, 87, 90, 95, 97, and 101 of the Commission's Rules to Facilitate the Development and Use of the Universal Licensing System in the Wireless Telecommunications Services*, Report and Order, 13 FCC Rcd 21027, 21071, para. 96 (1998) (*Universal Licensing System Report and Order*) (adopting, *inter alia*, Section 1.949 of the Rules); Memorandum Opinion and Order on Reconsideration, 14 FCC Rcd 11476, 11485–86, para. 22 (1999) (*Universal Licensing System MO&O*) (collectively, *Universal Licensing System Orders*).

operating station WPKM212 without Commission authority for more than nine years and for failing to seek timely renewal of the station's license.⁴

3. On August 27, 2012, Emigrant responded to the *NAL* and sought to reduce or cancel the proposed forfeiture.⁵ In its *NAL* Response, Emigrant does not dispute that it operated station WPKM212 without Commission authority for over nine years or that it failed to seek timely renewal of the station's license. Emigrant argues, however, that its violations were minor because the unauthorized operation did not involve "a large manufacturing facility over a wide area with numerous devices," and that the company acted immediately and in good faith to remedy the violations when brought to its attention.⁶ Emigrant also contends that a \$20,000 forfeiture is "excessive" in light of the financial impact it would have on Emigrant and its owners, and when compared to the \$25,000 forfeiture assessed in *BASF*.⁷

III. DISCUSSION

4. The Bureau assessed the proposed forfeiture in accordance with Section 503(b) of the Act,⁸ Section 1.80 of the Rules,⁹ and the Commission's *Forfeiture Policy Statement*.¹⁰ In examining Emigrant's *NAL* Response, we "take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹¹ As discussed below, we reject Emigrant's arguments for reduction or cancellation of the proposed forfeiture; we affirm our conclusion in the *NAL* that Emigrant willfully¹² and repeatedly¹³ violated Section 301 of the Act and Section 1.903(a) of the Rules by operating station WPKM212 without Commission authority for more than nine years and also violated Section 1.949(a) of the Rules by failing to file a timely license renewal application for the station.

⁴ See *NAL*, 27 FCC Rcd at 8918–21, paras. 5–9.

⁵ See Emigrant Storage LLC, Response to Apparent Liability for Forfeiture and Request for Cancellation or Reduction (Aug. 27, 2012) (on file in EB-SED-13-00008885) (*NAL* Response).

⁶ *Id.* at 1.

⁷ See *id.* at 1–2 (citing *BASF Corp.*, Notice of Apparent Liability for Forfeiture, 25 FCC Rcd 17300 (Enf. Bur. 2010) (\$25,000 forfeiture assessed for five years of apparent unauthorized operation and failure to seek timely renewal of station license) (*BASF*) (forfeiture paid)).

⁸ 47 U.S.C. § 503(b).

⁹ 47 C.F.R. § 1.80.

¹⁰ *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087, 17113 (1997) (*Forfeiture Policy Statement*), *recons. denied*, Memorandum Opinion and Order, 15 FCC Rcd 303 (1999).

¹¹ 47 U.S.C. § 503(b)(2)(E).

¹² Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312 clarifies that this definition of willful applies to Sections 312 and 503 of the Act, H.R. Rep. No. 97-765 (1982) (Conf. Rep.), and the Commission has so interpreted the term in the Section 503(b) context. See *So. Cal. Broad. Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387, 4387–88, para. 5 (1991), *recons. denied*, 7 FCC Rcd 3454 (1992).

¹³ Section 312(f)(2) of the Act, which also applies to forfeitures assessed pursuant to Section 503(b) of the Act, defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(2); see *Callais Cablevision, Inc.*, Notice of Apparent Liability for Monetary Forfeiture, 16 FCC 1359, 1362, para. 9 (2001).

5. Section 301 of the Act and Section 1.903(a) of the Rules prohibit the use or operation of any apparatus for the transmission of energy or communications or signals by radio except under, and in accordance with, a Commission authorization.¹⁴ Additionally, under Section 1.949(a) of the Rules, a licensee must file an application for renewal of any station license it intends to continue to operate “no later than the expiration date of the authorization for which renewal is sought and no sooner than 90 days prior to expiration.”¹⁵ Absent a timely filed renewal application, a wireless license automatically terminates on the license expiration date.¹⁶

6. As previously noted, Emigrant does not dispute that it operated station WPKM212 without Commission authority or that it failed to timely file for continued operating authority. Emigrant argues, however, that the proposed forfeiture should be cancelled or reduced because the violations were minor in light of the size of its operations and because it acted in good faith to resolve the violations when brought to its attention.¹⁷ We disagree. Under Section 301 of the Act and Section 1.903(a) of the Rules, Emigrant was required to obtain Commission authorization to operate its station irrespective of operation size, purpose, or number of devices in use.¹⁸ Indeed, this threshold requirement furthers the Commission’s goal of “protect[ing] the public and licensees providing service to the public from interference caused by other authorized or unauthorized users of spectrum.”¹⁹ As the record reflects, Emigrant’s unauthorized operation compromised this goal by causing harmful interference to another wireless operator.²⁰ In addition, Emigrant’s unauthorized operation continued for over nine years—almost twice as long as the station’s initial license term. Taken together, these facts do not constitute a minor violation. Moreover, while Emigrant took prompt action to come into compliance with the Rules before the Commission initiated the present investigation (and which the Bureau acknowledged when it reduced the proposed forfeiture in the *NAL*²¹), the significant duration of the unauthorized operation and

¹⁴ 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

¹⁵ 47 C.F.R. § 1.949(a). Licensees who want to operate their stations after the expiration of their station licenses must affirmatively request continued operating authority from the Commission. In its *Universal Licensing System Orders*, the Commission mandates the filing of certain applications to obtain such authority. If a licensee intending continued operations fails to file a timely renewal application, the Commission requires such licensee to seek temporary or new operating authority. See *Universal Licensing System Report and Order*, 13 FCC Rcd at 21071, para. 98 (directing licensees that fail to file timely renewal applications to submit a new application or, if necessary, a request for special temporary operating authority); *Universal Licensing System MO&O*, 14 FCC Rcd at 11485–86, para. 22 (permitting, in the alternative, the acceptance and processing of late filed renewal applications under certain circumstances). In the *Universal Licensing System MO&O*, the Commission expressly held that it could “initiate enforcement action against the licensee for untimely filing and unauthorized operation between the expiration of the license and the late renewal filing, including, if appropriate, the imposition of fines or forfeitures for these rule violations.” *Id.*

¹⁶ See 47 C.F.R. § 1.955(a)(1).

¹⁷ See *NAL* Response at 1. Emigrant acknowledged that its earlier arguments of inadvertence and changes in personnel were not sufficient reasons to cancel or reduce the forfeiture. See *id.*

¹⁸ See 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

¹⁹ *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Notice of Proposed Rulemaking, 15 FCC Rcd 24203, 24217, para. 35 (2000).

²⁰ As discussed in the *NAL*, Emigrant became aware of its unauthorized operation when another wireless operator called to complain of interference. See *NAL*, 27 FCC Rcd at 8918, para. 4.

²¹ See *id.* at 8920–21, para. 9 (recognizing Emigrant’s “non-dilatory actions” taken to “come into compliance” before “the Bureau’s investigation and the initiation of enforcement action”).

other facts and circumstances of this case do not justify cancelling or further reducing the proposed forfeiture.

7. In addition, Emigrant argues that the \$20,000 forfeiture is “excessive” in light of the financial impact it would have on Emigrant and its owners, and also when compared to the \$25,000 forfeiture assessed in *BASF*, which involved a “multi-national corporation and operation of a station at a large facility.”²² As a threshold matter, the financial records Emigrant provided with its NAL Response do not support a downward adjustment or cancellation for inability to pay. Although Emigrant did not expressly state that it could not pay the forfeiture, it provided financial records to argue that the forfeiture was “excessive” and a “significant punitive penalty” when compared to Emigrant’s gross revenues and overall size.²³ In general, an entity’s “gross revenues are the best indicator of its ability to pay a forfeiture.”²⁴ Having examined the financial records provided by Emigrant, we find that a \$20,000 forfeiture expressed as a percentage of Emigrant’s gross revenues is payable,²⁵ and as such, decline to cancel or reduce the forfeiture on this basis.

8. Moreover, we are unpersuaded by Emigrant’s argument that the forfeiture is excessive when compared to the forfeiture assessed in *BASF*.²⁶ Specifically, Emigrant argues that *BASF* “was a virtually identical factual situation; however, it involved a multimillion dollar multi-national corporation and operation of a station at a large facility,” but resulted in a forfeiture that was only \$5,000 more than the forfeiture proposed here.²⁷ In making that comparison, Emigrant fails to note the significant difference in the length of the unauthorized operation. In assessing the \$25,000 forfeiture in *BASF*, the Bureau stressed the five years of unauthorized operation as well as the company’s status as a profitable enterprise.²⁸ In the instant case, the Bureau carefully considered the nine-year duration of Emigrant’s misconduct (nearly *twice* the length of the initial license term) in the *NAL* when proposing a forfeiture amount.²⁹ Thus, we also decline to cancel or reduce the forfeiture on this basis.³⁰

²² NAL Response at 2.

²³ See *id.* at 1–2.

²⁴ *PJB Commc’ns of Va., Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089, para. 8 (1992).

²⁵ See *id.* (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator’s gross revenues); *Coleman Enters., Inc.*, Order of Reconsideration, 16 FCC Rcd 10023, 10025, para. 6 (2001) (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator’s gross revenues); *Hoosier Broad. Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641, para. 7 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator’s gross revenues).

²⁶ See *supra* note 7.

²⁷ See NAL Response at 2.

²⁸ See *BASF*, 25 FCC Rcd at 17303–04, para. 11.

²⁹ It is well established that the Commission considers duration of the violation a critical factor in determining the amount of a forfeiture in order to avoid creating perverse incentives, to encourage licensees to monitor their license expiration dates, and to ensure that licensees timely seek operating authority. See *NAL*, 27 FCC Rcd at 8920, para. 9 n.26 (noting line of cases where the Commission “upwardly adjusted the base forfeiture . . . [because] the unauthorized operation continued for an extended period of time”); see also *Remel, Inc. & Its Corporate Parent Thermo Fisher Scientific, Inc.*, Notice of Apparent Liability for Forfeiture, 28 FCC Rcd 8778, 8781, para. 8 n.28 (2013) (same) (forfeiture paid).

³⁰ The Commission has broad discretion to determine the appropriate forfeiture depending on the circumstances of each case and is not bound by the forfeitures imposed in different cases. See, e.g., *Cont’l Broad. Inc. v. FCC*, 439 (continued . . .)

9. In sum, after full consideration of Emigrant's NAL Response, the record before us, and the applicable statutory factors, we affirm our conclusion in the *NAL* that Emigrant willfully and repeatedly violated Section 301 of the Act and Section 1.903(a) of the Rules³¹ by operating station WPKM212 without authorization and also violated Section 1.949(a) of the Rules³² by failing to file a timely license renewal application for the station. Further, because Emigrant failed to provide a sufficient basis for cancellation or reduction of the forfeiture, we also affirm the proposed \$20,000 forfeiture.

IV. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's rules,³³ Emigrant Storage LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of twenty thousand dollars (\$20,000) for willful and repeated violations of Section 301 of the Communications Act of 1934, as amended, and Sections 1.903(a) and 1.949(a) of the Commission's rules.³⁴

11. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's rules within thirty (30) calendar days after the release date of this Forfeiture Order.³⁵ If the forfeiture is not paid within the period specified, the case may be referred to the U.S. Department of Justice for enforcement of the forfeiture pursuant to Section 504(a) of the Communications Act of 1934, as amended.³⁶ Emigrant Storage LLC shall send electronic notification of payment to Jason Koslofsky at Jason.Koslofsky@fcc.gov, Daudeline Meme at Daudeline.Meme@fcc.gov, and Samantha Peoples at Sam.Peoples@fcc.gov on the date said payment is made.

12. The payment must be made by check or similar instrument, wire transfer, or credit card, and must include the NAL/Account Number and FRN referenced above. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.³⁷ When completing the FCC Form 159, enter the Account Number in block number 23A (call sign/other ID) and enter the letters "FORF" in block number 24A (payment type code). Below are additional instructions Emigrant Storage LLC should follow based on the form of payment it selects:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

(continued from previous page . . .) _____

F.2d 580, 583 (D.C. Cir. 1971) (noting that "the choice of remedies and sanctions is a matter wherein the Commission has broad discretion") (internal citation omitted).

³¹ 47 U.S.C. § 301; 47 C.F.R. § 1.903(a).

³² 47 C.F.R. § 1.949(a).

³³ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.111, 0.311, 1.80.

³⁴ 47 U.S.C. § 301; 47 C.F.R. §§ 1.903(a), 1.949(a).

³⁵ 47 C.F.R. § 1.80.

³⁶ 47 U.S.C. § 504(a).

³⁷ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and Account Number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.
- Payment by credit card must be made by providing the required credit card information on FCC Form 159 and signing and dating the Form 159 to authorize the credit card payment. The completed Form 159 must then be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank – Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.

13. Any request for making full payment over time under an installment plan should be sent to: Chief Financial Officer—Financial Operations, Federal Communications Commission, 445 12th Street, S.W., Room 1-A625, Washington, DC 20554.³⁸ If Emigrant Storage, LLC has questions regarding payment procedures, it should contact the Financial Operations Group Help Desk by phone, 1-877-480-3201, or by e-mail, ARINQUIRIES@fcc.gov.

14. **IT IS FURTHER ORDERED** that a copy of this Forfeiture Order shall be sent by Certified Mail, Return Receipt Requested, to William A. Manke, Sr. and Lavon T. Manke, Owners, Emigrant Storage LLC, 2500 Longley Lane, Reno, NV 89502; and to James M. Walsh, Walsh, Baker & Rosevear, P.C., counsel to Emigrant Storage LLC, 9468 Double R Boulevard, Suite A, Reno, NV 89521.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Acting Chief
Enforcement Bureau

³⁸ See 47 C.F.R. § 1.1914.